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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961
No. 241

SUNKIST GROWERS, INC., a corporation, and the EXCHANGE ORANGE PRODUCTS COMPANY, a corporation,
Petitioners,

vs.

WINCKLER & SMITH CITRUS PRODUCTS CO., a corporation, and RONALD WALKER, as Trustee of WINCKLER & SMITH CITRUS PRODUCTS CO.,
Respondents.

BRIEF FOR RESPONDENTS.

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Respondents.

BRIEF FOR RESPONDENTS.

Opinion Below.

The opinion of the Court of Appeals is reported in 284 F. 2d 1, and is printed at pages 3950-4005 of the Record. An order modifying that opinion in certain particulars is reported in 289 F. 2d 933, and is printed at pages 4006-4007 of the Record. There was no opinion in the District Court but that Court's judgment entered upon the jury's verdict is printed at pages 336-339 of the Record.

Jurisdiction.

The judgment of the Court of Appeals was entered on September 30, 1960. [R. 3950, 4005-4006.] Timely petitions for rehearing were filed by both petitioners and respondents, which were denied on May 5, 1961. [R. 4008.] The petition for certiorari herein was filed on July 20, 1961. Jurisdiction of this Court was invoked under 28 U. S. C. Sec. 1254(1).

Statutes Involved.

The statutes involved are sections 1 and 2 of the Sherman Act (Act of July 2, 1890, 26 Stat. 290; 15 U. S. C. A. Secs. 1, 2); Sections 4 and 6 of the Clayton Act (Act of October 15, 1914, 38 Stat. 731; 15 U. S. C. A. Secs. 4, 6); and Section 1 of the Capper-Volstead Act (Act of February 18, 1922, 42 Stat. 388; 7 U. S. C. A. Sec. 291). These statutes in pertinent part are set out in the appendix to this brief.

Questions Presented.

Where a group of citrus fruit growers form a co-operative organization for the purpose of collectively processing and marketing their fruit, and carry out those functions through the agency of three cooperative agricultural associations, each of which is basically wholly owned and governed by those growers, and each of which is admittedly entitled to the exemption from the antitrust laws accorded to agricultural cooperatives by the Capper-Volstead Act (7 U. S. C. A. Sec. 291)—is an unlawful conspiracy, combination or agreement established under Sections 1 and 2 of the Sherman Act, upon proof only that these growers, through the agency of these three cooperatives, agreed among only themselves with respect to the extent of the division of the function of processing between them or with respect to the price they would charge in the open market for the fruit and the by-products thereof processed and marketed by them?[1]

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[1]As will be shown hereinafter under the Argument neither the facts adduced at trial nor the trial Court's instructions to the jury provide any basis for such a question.

Statement of Facts.

On February 1, 1952, respondent, an independent processor of citrus fruit juice, brought an action for treble damages under Section 4 of the Clayton Act (15 U. S. C. Sec. 15) against the California Fruit Growers Exchange,[2] its two processing affiliates Exchange Orange Products Company, and Exchange Lemon Products Company, and TreeSweet Products Company, an independent processor of citrus fruit juices, for alleged violations of Sections 1 and 2 of the Sherman Act (15 U. S. C. Secs. 1, 2).[3] The charge was conspiracy to restrain, conspiracy to monopolize, and actual monopolization of interstate commerce in the production and marketing of citrus fruit and canned fruit juices produced and processed in the State of California and marketed throughout the United States. [R. 3-23.] This complaint was twice amended. [R. 72-99; 250-274.]

A. The Second Amended Complaint.

In the Second Amended Complaint petitioners Sunkist Growers, Inc., and the Exchange Orange Products Company were named as defendants. Exchange Lemon Products Company, TreeSweet Products Company, and E. A. Silzle Corporation (another independent Cali-

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[2]Subsequently the name of this concern was changed to Sunkist Growers, Inc. [R. 545.]

[3]The Complaint also charged violations of Section 3 of the Robinson-Patman Act (15 U. S. C., Sec. 13a), of Sections 16,700-16,758 of the California Business and Professions Code (commonly known as the "Cartright Antitrust Law") and Sections 17,000-17,101 of the same code (commonly known as the "Unfair Trade Practices Act") [R. 252]. The Robinson-Patman Act charge was dismissed on motion of plaintiffs after the trial began. [R. 250.] The two charges under the California statutes were dismissed on motion of defendants without objection from plaintiffs. [R. 176.]

fornia citrus juice processor) were named as co-conspirators but not as defendants. [R. 254-256.][4] Prior to trial TreeSweet had made a settlement with plaintiffs by the payment of $2,500.00 as damages. The dismissal of TreeSweet as a defendant was without prejudice. [R. 67-72.]

The Second Amended Complaint [R. 251-274] charged in Count I that the defendants and the co-conspirators had conspired to violate Section 1 of the Sherman Act by entering into contracts which had the purpose and effect of unreasonably restraining interstate commerce in canned citrus fruit juice produced and processed in the State of California and marketed throughout the United States, particularly canned single strength orange juice, and that such contracts had had the effect of eliminating plaintiff as a competitor from such market. [R. 265.]

Six specifications were set out relating to what the defendants and the co-conspirators were alleged to have done to restrain interstate commerce and to eliminate plaintiff as a competitor, to wit: the making of reciprocal processing contracts between Exchange Orange and Exchange Lemon; establishment by Sunkist and Exchange Orange of a price for product oranges in 1951 for sale to independent processors of single strength orange juice, including plaintiff, which was so high as to make it impossible for such independents, including

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[4]For convenience hereinafter Sunkist Growers, Inc., will be referred to as "Sunkist"; The Exchange Orange Products Company will be referred to as "Exchange Orange"; The Exchange Lemon Products Company will be referred to as "Exchange Lemon"; TreeSweet Products Company will be referred to as "TreeSweet"; the E. A. Silzle Corporation will be referred to as "Silzle"; and respondents will be referred to as "Winckler."

plaintiff, to purchase such oranges, and process and sell the resultant juice at prices which would be competitive with the prices charged by Sunkist, TreeSweet and Silzle; the making of contracts by Exchange Orange with TreeSweet and Silzle under which these latter two processors could process defendants' oranges and sell the resultant single strength juice at prices which were competitive with the prices at which Sunkist sold such juice, and the refusal of defendants to make oranges available to plaintiff on any comparable basis. [R. 266-269.]

Count II of the Second Amended Complaint charged that defendants Sunkist and Exchange Orange, and the co-conspirator Exchange Lemon, had monopoly control over the production and distribution of fresh citrus fruit available in California and Arizona for processing into canned natural and frozen concentrate citrus juices in California, and that by entering into oral and written agreements and by doing the six acts described in Count I, the defendants and the co-conspirators TreeSweet, Silzle, and Exchange Lemon had conspired to monopolize, and had in fact monopolized, that part of interstate commerce in natural and frozen concentrate fruit juices produced in California and sold in interstate commerce, particularly single strength orange juice, with resultant damage to plaintiff. [R. 271.]

It was alleged further in Count II that pursuant to the alleged conspiracy, and in abuse of their monopoly power and control over product oranges, the defendants had entered into contracts with independent processors other than TreeSweet and Silzle under which defendants secured "first call" on the processing facilities of such independents to the exclusion of other marketing

cooperatives, including the Independent Fruit Growers Association. [R. 271-272.]

After a lengthy trial the case was submitted to the jury which returned a general verdict against Sunkist and Exchange Orange in the sum of $500,000. [R. 295.] Pursuant to Section 4 of the Clayton Act this judgment was trebled, and the Court allowed $195,000 as attorney's fee. With deduction of $2,500.00 previously paid by TreeSweet [R. 68-73], the total judgment entered was $1,692,500. [R. 336-339.] On appeal from the judgment the Court of Appeals affirmed on the issue of liability and reversed and remanded on the issue of the amount of damages. [R. 4005-4006.] A petition for certiorari by Sunkist and Exchange Orange was granted, limited to the single question previously stated. [R. 4009.][1]

B. Description of the Parties Involved.

1. Respondent Winckler.

Winckler was a California corporation organized on October 29, 1945. Until March 26, 1952, it owned and operated a citrus fruit processing plant at Anaheim, California. Subsequent to such date such products as were produced at its plant were produced by the Trustee acting under the supervision and control of the Federal District Court under Chapter X of the Federal Bankruptcy Act. [R. 538.] Its president and operating head was Nicholas J. Winckler. [R. 994.]

[1]There is presently pending in this Court a petition for certiorari by respondents herein (No. 275, October Term, 1961), seeking review of that part of the judgment of the Court of Appeals which reversed the judgment of the District Court with respect to the amount of damages.

Throughout its existence the principal business of Winckler was the processing and sale in interstate commerce of canned single strength orange juice. [R. 999, 1003-1004.] It sold such juice in direct competition with canned single strength orange juice produced and sold by petitioners, by TreeSweet and by Silzle. [R. 540, 773-774, 886, 999-1001, 1005-1007, 1479-1485, 2969-2970.] In 1949 and 1950, Winckler invested $97,000.00 in new machinery and equipment, most of which was designed for the production of frozen concentrate, and by late 1950 Winckler was also producing canned lemonade, hot and frozen orange concentrate, blends and beverages. [R. 995-998, 1002-1005.]

2. Petitioners Sunkist and Exchange Orange and Co-Conspirator Exchange Lemon.

With a few additions deemed essential to an adequate factual presentation, respondents accept petitioners' description of the organization and functions of the constituent elements of the so-called "Sunkist System" of cooperatives.

Petitioner Sunkist is the largest marketing agency in the United States for fresh and by-product* citrus fruits. In 1951, its total volume of sales was in excess of $150,000,000.00 f.o.b. shipping point, of which 18 percent, or approximately $27,000,000.00 represented by product sales as distinguished from fresh fruit sales. [R. 587.] Approximately 60 percent of the oranges produced by growers affiliated with Sunkist in 1951 was sold as fresh fruit. The remainder was either sold to independent processors as product fruit or was processed by or at the direction of Exchange Orange

*"By-product fruit" is citrus fruit which is not marketed as fresh fruit. It is processed by canners into single strength juice, hot pasteurized concentrate juice and frozen concentrate juice.

into various products, including juice products, and sold. [R. 540, 541.] Sunkist sells by-product oranges to independent processors through a sales office located in Los Angeles. [R. 618.] Through its "Products Department" it sells various products manufactured by Exchange Orange and Exchange Lemon, including juices, oil, pectin, pharmaceuticals and cattle feed. [R. 553, 2956-2958.][7]

Exchange Orange is a wholly-owned subsidiary of Sunkist. It is a processing company engaged primarily in the business of manufacturing various products from oranges and grapefruit, principally juice products. It takes that part of such by-product fruit which is not sold by Sunkist to independent processors and either itself processes such fruit or makes contracts with other processors for such purpose. [R. 538-540; 552-553; 666-669.] Exchange Orange manufactures three types of juice products from by-product oranges, namely, single strength juice, which is the natural juice of the fruit; hot concentrate, a pasteurized concentrate used as a base for various ade drinks, and frozen concentrate which, upon the addition of water, becomes ordinary orange juice. [R. 702-712.]

Co-conspirator Exchange Lemon is owned by the local grower associations affiliated with Sunkist which produce lemons. Its chief function is to process into juice and other products those lemons produced by Sun-

[7]The "Products Department" is managed by a joint executive committee made up of an equal number from the boards of directors of both Exchange Orange and Exchange Lemon. [R. 562-565; 878-881.]

kist grower members which are not sold as fresh fruit. [R. 538-540; 552-553; 555-563; 2725-2726.]

3. The Co-Conspirators TreeSweet and Silzle.

TreeSweet is a California corporation for profit and is engaged primarily in the business of processing and selling canned single strength orange juice which it sells in interstate commerce, largely under its own label. [R. 540; 906-910.] Its principal supplier of product oranges during the period 1947-1951, inclusive, was Exchange Orange. [R. 908, 910; Exs. 20, 21, 22, E 332-355.][8] TreeSweet competes directly with Sunkist, Silzle and Winckler in the sale in interstate commerce of its canned single strength orange juice. [R. 540; 744; 773-774; 886; 999-1001; 1005-1007; 1479-1485; 2969-2970.] In 1951 TreeSweet processed no frozen citrus juices. [R. 906.]

Silzle is a California corporation for profit, engaged in the business of processing and selling by-product citrus fruit into citrus juices. Like TreeSweet, its principal product is canned single strength orange juice, which it sells in interstate commerce [R. 540; 947] to private label buyers [R. 2969] in direct competition with similar single strength orange juice sold by Sunkist, TreeSweet and Winckler. [R. 540; 744; 773-774; 886; 999-1001; 1005-1007; 1479-1485; 2969-2970.] Silzle processed no frozen citrus fruit juice products in 1951. [R. 947.]

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[8]Since the "Exhibit Volume" is not paged consecutively with other parts of the record, a page reference herein which is preceded by the letter "E" refers to the Exhibit Volume.

C. Control of California-Arizona Citrus Industry.

During the period 1949-1951, inclusive, petitioners controlled approximately 71 percent of all oranges, and approximately 88 percent of all lemons, grown in the California-Arizona area. On the average petitioners sold approximately 60 percent of their oranges as fresh fruit, as was the case in 1951; of the remaining 40 percent a part was sold by Sunkist to independent processors and the rest was turned over to Exchange Orange for processing by such company or at its direction. [R. 277-278, 540-542, 553-555, 600; Ex. 3A—B(1)-16, E 38, 39.]

In an average year petitioners had more by-product oranges than could be processed with their own facilities. The evidence showed that continuously since 1920, petitioners have maintained the general policy of utilizing to the fullest extent possible the facilities of independent processors in disposing of their by-product fruit, including by-product oranges. The reasons advanced by the general managers of Sunkist and Exchange Orange for the maintenance of such a policy was the desire to take advantage of the skills of the independent processors in the development of new citrus products and in the broadening of the market for such products; the desire to avoid the necessity of making large capital expenditures for additional processing machinery and equipment which would be required if they processed all of their own by-product fruit, and the fact that returns from processing contracts were frequently greater than would have been the case had the fruit been sold outright. Even in years of short supply petitioners made processing contracts with independents, particularly with those who had been

regular customers. [R. 2711, 2713, 2714, 2983-2985, 2992-2995.]

In the critical year 1951, petitioners controlled approximately 70 percent of all by-product oranges available in the California-Arizona area. [R. 688, 1582; Exs. 72, 75, CF, E 531, 535, 543.] The remaining 30 percent was scattered among three processing concerns[9] which had processing facilities of their own and hence had no by-product oranges for sale, and a group of growers organized into an association[10] which had packing and shipping facilities but no processing equipment, and either sold its oranges outright to processors or entered into contracts with processors. [R. 686-689, 1436, 1577-1582, 1589-1596.]

D. Respondent's Theory of Liability and the Evidence in Support Thereof.

Respondent's theory of liability and damage, as disclosed by the evidence, was that in 1951 petitioners controlled the supply of by-product oranges in the California-Arizona area available to independent processors, including respondent, for processing into citrus fruit products, particularly single strength orange juice; that petitioners combined and conspired with their affiliate Exchange Lemon and with two independent processors, TreeSweet and Silzle, which two independent processors were competitors of both peti-

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[9]These three concerns were: Mutual Orange Distributors of Anaheim, California, a grower cooperative; American Fruit Growers Company of Fullerton, California, a corporation for profit, and Paramount Citrus Association of San Fernando, California, a corporation for profit with grower members.

[10]The Independent Citrus Growers and Shippers Association of Fullerton, California.

tioners and respondent, to restrain and to monopolize interstate trade and commerce in 1951 in the processing and sale of California citrus fruit juices, particularly single strength orange juice, and that such monopolization was actually achieved, and that the purpose or effect of such combination and conspiracy was the elimination of respondent as a competitor in the interstate market for such juices, particularly California single strength orange juice, respondent's principal product.

The means of achieving such result were the following: (1) the setting of a price, after consultation between petitioners and TreeSweet and Silzle, of $40.00 per ton for by-product oranges available to independent processors of single strength orange juice, including respondent, and maintaining such price throughout the 1951 season; (2) the execution of contracts between petitioners and TreeSweet and Silzle under the terms of which by-product oranges were made available to the latter two companies at prices which were in fact and effect far below the $40.00 price, and under an arrangement pursuant to which TreeSweet and Silzle sold the resultant single strength juice in the interstate markets at the Sunkist established prices and with a guaranteed profit to TreeSweet and Silzle, and (3) the refusal by petitioners to make oranges available to respondent, a regular customer of petitioners, on any basis other than at a price of $40.00 a ton, a price which petitioners conceded no independent could pay for product oranges and process and sell the resultant single strength juice at a profit, or at prices competitive with the prices charged for such juice by petitioners, TreeSweet and Silzle, respondent's competitors.

The record evidence in support of this theory of liability is summarized below.

Petitioners by-product orange crop in 1951 was the largest in their history [R. 3045, 3046; Exs. FD, E 546], totalling approximately 318,000 tons. [R. 541.] This tonnage was disposed of in the following manner. Sunkist sold approximately 46,000 tons to independent processors [R. 541] for processing into hot and frozen concentrate.[11] The remaining 272,000 tons were turned over to Exchange Orange for disposition. Of this amount Exchange Orange processed approximately 164,000 tons with its own facilities, and Exchange Lemon processed approximately 31,200 tons for the account of Exchange Orange [R. 541]; approximately 45,000 tons were disposed of through contracts between Exchange Orange and four independent processors[12] for conversion into hot and frozen concentrate [Exs. 15, 16, 17, 17A, 18, 19, E 297-332], and the remaining tonnage, approximately 31,800 tons, was disposed of by contracts between Exchange Orange, and TreeSweet and Silzle for conversion into canned single strength juice. [Exs. 20, 25; E 332-341, 356-368.] It is these latter two contracts, together with the business setting in which, and the circumstances under which they were made, that gave rise to this lawsuit. Such circumstances are described below.

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[11]While the record does not show precisely the products into which this tonnage was converted, it was not shown that the product was single strength orange juice. The general manager of Exchange Orange testified that processors of hot and frozen concentrate could pay the 1951 Sunkist price for product oranges and sell the resultant juice products at a profit. [R. 2971.]

[12]These four processors were: General Foods, Hyland-Stanford, Mission Dry, and Harts.

1. Establishing and Maintaining a Price of $40.00 per Ton for By-Product Oranges in 1951.

In April 1951, petitioners set a selling price of $40.00 per ton on product oranges having a soluble solids content of 120 pounds per ton. [Exs. 5, E 43-44],[13] and circulated such price list to the trade [R. 623-624], including Winckler. [R. 1044; Ex. 42, E 478].[14] This price list remained unchanged throughout the year 1951, although in most years changes occurred during the year. [R. 625, 654-655.] The 1951 price list was the product of joint discussions between officials of Sunkist and Exchange Orange. [R. 616-619, 631.] An official of Sunkist also sought the views of certain independent processors as to what the 1951 prices on by-product oranges should be, including three processors of single strength juice, namely, TreeSweet, Silzle and Case-Swayne. [R. 627-628.][15]

Petitioners were unable to sell at the $40.00 price any of the approximately 31,800 tons of product oranges which they had available in 1951 for process-

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[13]The term "soluble solids" is descriptive of the constituent elements inside the orange other than water, such as citric acid, sugar and other dissolved solids. [R. 571-572.] The selling price of by-product oranges varies with the soluble solids content. In 1951, the price ranged from $17.00 per ton for fruit having 60 pounds of soluble solids, to $51.50 per ton for oranges containing 150 pounds of soluble solids. Most of the fruit with which this case is concerned ranged from 120 to 136 pounds of soluble solids per ton, or from $40.00 to $46.13 per ton. [R. 928, 1969; Ex. 5, E 43-44.]

[14]Petitioners did not send TreeSweet a copy of their 1951 price list. The only oranges purchased by TreeSweet for processing purposes in 1951 were purchased from sources other than Sunkist. [R. 917-918, 929-930, 938.]

[15]No price discussions occurred between any official of petitioners and Winckler. [R. 627-628.]

ing into single strength orange juice.[16] The manager of Exchange Orange made it clear why this was so. He stated that no single strength juice processor could pay the $40.00 price for oranges, and process and sell the resultant juice at prices which would be competitive with the prices charged in 1951 by Sunkist for single strength juice, and make a profit. [R. 862-863.][17] Since petitioners were desirous of keeping California single strength orange juice in the markets throughout the country during the 1951 season [R. 891-892, 2971-2972; Ex. 29, E 452-453], they disposed of the tonnage by making processing contracts with TreeSweet and Silzle. [Exs. 20, 25, E 332-341, 356-368.]

2. The Contracts Between Exchange Orange, and TreeSweet and Silzle.

In 1951 there were four independent processors in the California-Arizona area which were engaged primarily in the business of processing and selling in interstate commerce canned single strength orange juice. Each of these concerns was dependent upon others, chiefly the petitioners, for its source of supply of product oranges with which to manufacture such juice. These independent processors of canned single strength orange juice were Winckler, Case-Swayne Company, and the co-conspirators TreeSweet and Silzle. [R. 540,

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[16]The processors which purchased oranges for conversion into hot and frozen concentrate could pay the $40.00 price and still make a profit on the sale of such products. [R. 2971-2972.]

[17]The same admission included the statement that no independent processor could compete price-wise with TreeSweet and Silzle [R. 862-863] which were made the beneficiaries of special deals which will be described in the next subsection of this brief.

906, 947, 1004.] Each of the processors was in direct competition with each of the others, and all four competed directly with Sunkist, in the manufacture and sale in interstate commerce of canned single strength orange juice. [R. 744, 773-774, 885-886, 999-1001, 1005-1007, 1479-1485, 2273, 2969-2970.][18]

Winckler had been a regular customer of petitioners throughout its existence in the purchase of by-product oranges for processing into canned single strength orange juice. [R. 646-647, 1005-1006, 1011, 1044-1045, 1441.] Neither TreeSweet nor Silzle nor Case-Swayne had been a regular customer of petitioners in the purchase of oranges for conversion into single strength orange juice. [R. 640, 929, 948-950, 2289-2290.]

Petitioners disposed of the approximately 31,800 tons of oranges available for processing into single strength orange juice by entering into a contract with TreeSweet [Ex. 20, E 332-341], under which TreeSweet processed 24,148 tons [R. 755]; and by making a contract with Silzle [Ex. 25, E 356-368], under which that company processed 6,675 tons. [Ex. 66A, E 520.][19] They offered a similar contract to Case-Swayne

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[18]TreeSweet sold in the national market under its own label [R. 908]; Silzle sold in the national market to private label buyers [R. 2989, 3064]; Case-Swayne sold largely on the West Coast under its own label [R. 2969], and Winckler sold in the national market under its own label. [R. 998.]

[19]Earlier in the year Silzle had purchased 72 tons of oranges from Sunkist for processing into single strength juice at a price of $27.00 per ton, including the oil and peel [R. 776-778], and 527 tons at $22.50 per ton, including the oil and peel. [R. 778-780; Exs. 6, 7, E. 119-141, 143-147, R. 636, 642.]

which that company declined [R. 2276-2278],[20] but refused Winckler's repeated timely requests either for a similar contract or for oranges at a price which would permit Winckler to process and sell single strength orange juice at prices which would be competitive with the prices at which Sunkist, TreeSweet and Silzle were selling such juice. [R. 1058-1084.]

a. *The TreeSweet Contract.*

Under the contract between Exchange Orange and TreeSweet [Ex. 20, E 332-341][21] the former company made oranges available to TreeSweet on a consignment basis, paid TreeSweet its processing costs at specified rates, as well as the cost of trucking the fruit to TreeSweet's plant. TreeSweet agreed to and did purchase the resultant single strength orange juice at the Sunkist published selling price for such juice as of the date of purchase, less discounts and allowances of 15 percent not available to other purchasers, including Winckler.[22] In addition, TreeSweet was

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[20]At the time petitioners offered such a contract to Case-Swayne that company had already committed its processing facilities to the making of vegetable juices, and single strength orange juice on a contract basis for the Independent Citrus Growers and Shippers Association. [R. 2272-2274, 2278-2280, 2284, 2287, 2290-2293.]

[21]The TreeSweet contract was made after discussions among officials of Sunkist, Exchange Orange and TreeSweet and was not available to any other independent processor. [R. 611-612, 752-755, 911-912, 2980-2982, 2990, 3039, 3066.]

[22]Winckler purchased some juice from Sunkist in 1951 and paid approximately $2.46 a case therefor while TreeSweet was purchasing the same juice for $1.73 a case. [R. 1085, Exs. 49, 50, E 481, 491.] Sunkist also maintained a two price structure in the sale of its single strength orange juice, charging a higher price for such juice in California and Arizona and a lower price elsewhere [R. 819, 825-827; Ex. 27, E 395-452.] When TreeSweet sold the juice to customers located in California and Arizona it paid petitioners therefor at the higher Sunkist price less the 15 percent discount, and the 7¢ per case advertising allowance. When it sold elsewhere it paid petitioners for the juice at the lower Sunkist price. [R. 926-927, 3056-3057.]

given an advertising allowance of 7¢ per case [R. 765-768], although the juice was sold under the Tree-Sweet rather than the Sunkist label. [R. 758.][23] Tree-Sweet was not required to pay for the juice until it was sold. Under the contract Exchange Orange was to get the oil and peel.

In effect, the contract provided that petitioners were to be paid for their product oranges on the basis of the difference between the amount credited to Tree-Sweet for processing such fruit and the price which TreeSweet paid petitioners for the processed juice at the time such juice was sold by TreeSweet. [R. 756.] On this basis TreeSweet was credited with $859,004.00 for processing the 24,148 tons, and it paid petitioners $1,-204,031.41 for the single strength juice processed therefrom. The difference, to wit $345,027.41, was the sum which TreeSweet actually paid for the oranges, or at the rate of $14.29 per ton before adjustment for the oil and peel. [Ex. 67, E 525-528.] The net return on the oil and peel was $10.81 per ton. [Ex. 67, E 527-528.] Thus, the total received by petitioners for the oranges processed and purchased by TreeSweet was $25.10 per ton, or at a price which was $19.12 per ton less than petitioners' published selling price for oranges having a comparable soluble solids content.[24]

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[23]The manager of Exchange Orange conceded that the normal and usual purpose of an advertising allowance was to advertise the brand name of the concern granting the allowance, but that in this situation TreeSweet was permitted to make such use as it saw fit of the advertising allowance. [R. 767-769.]

[24]The average soluble solids content of the oranges processed by TreeSweet under the 1951 contract was 131.6 pounds per ton [R. 928.] Petitioners' 1951 published selling price for oranges having a soluble solids content of 131.6 pounds per ton was $44.22 per ton. [Ex. 5, E 44.]

Petitioners conceded that such contract not only protected TreeSweet against any inventory losses in the market price for canned single strength orange juice during both the selling and carryover seasons [R. 3054], but also guaranteed TreeSweet a profit; that TreeSweet could not lose under such a contract. [R. 846.]

Petitioners' selling price on the 12/46 oz. family size case[25] of canned single strength orange juice in 1951, ranged from $2.50 to $2.80 per case in the California-Arizona area, and from $2.20 to $2.50 per case in all other areas. [R. 819; Exs. 27, 28, E 395-452.] TreeSweet's selling prices for such juice in 1951 were the same as those of petitioners. [Exs. 27, 36, E 395-442, 461-466.][26] Petitioners admitted that under normal use of processing facilities it would cost approximately $3.08 to produce a case of 12/46 oz. single strength orange juice with fruit which cost $40.00 per ton, before any addition for selling expense and profit, that is $1.74 per case for the oranges, and $1.35 per case for the cost of manufacture. [R. 745-749.][27]

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[25]The 12/46 oz. family size accounted for approximately 80 percent of the pack. [R. 746.]

[26]The president of TreeSweet admitted that his company's selling prices were patterned after those of Sunkist, and were usually the same as the Sunkist prices, that such was the custom in the industry. [R. 919-920.] The general manager of Exchange Orange stated that whenever Sunkist made a price change in single strength juice such a change was communicated immediately to TreeSweet. [R. 825.]

[27]The operating head of TreeSweet testified that his company could not have processed and the 24,148 tons it received from Exchange Orange in 1951 and sold the single strength orange juice at a profit, even if his company had had to pay as little as $33.00 per ton for such oranges. [R. 938.]

b. The Silzle Contract.

The contract between Exchange Orange and Silzle was substantially similar to the TreeSweet contract. [R. 774; Ex. 25, E 356-368.][28] Under this contract Silzle processed 6,675 tons of oranges at a cost to it of $215,602.10. The Silzle purchase price of the resultant single strength juice was $306,263.65. The difference of $90,661.55, after the allowance to Silzle of its processing costs of $215,602.10 was at the rate of $13.58 per ton for oranges with a soluble solids content of 120 pounds per ton before adjustment for the oil and peel. [Ex. 66A, E 522-524.][29] Under the contract petitioners were to get the oil and peel, which amounted to $4.08 per ton. [Exs. 11, 25, 66A; E 285-291, 356-368, 522-524.] Thus, the amount received by petitioners for oranges processed under this contract was $17.66 per ton, or at a rate of $22.34 per ton less than petitioners' published list price for oranges having a comparable soluble solids content.

Under the contract Silzle was given a discount of 12½ percent off the published Sunkist selling price at the time of its purchase of the juice. In addition, Silzle received an advertising allowance of 7c per case, although substantially all of its production was sold to private label buyers, and none of it was sold under the Sunkist label. [R. 800, 2969, 3065.] Silzle was to

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[28]This contract was not signed formally until September 10, 1951, but by its terms it was to be effective from and after July 15, 1951. [R. 784-789, 801-807, 950-956, 965-976, 2987-2988; Ex. 25, E 356-368.]

[29]The average soluble solids content of the oranges processed by Silzle under the contract was 120 pounds per ton. [Ex. 7, E 143-147.] The published Sunkist selling price for such oranges was $40.00 per ton. [Ex. 5, E 43-44.]

pack juice only for current sales, and not for inventory. [R. 874, 2989.]

Silzle's selling prices for the single strength juice were patterned after and were basically the same as the Sunkist selling prices. [R. 978, 986, 2952-2954.]

3. Petitioners' Refusal in 1951 to Make Oranges Available to Respondent Except at the $40.00 Price.

Throughout the 1951 processing and selling season petitioners were always willing to sell product oranges to respondent but only at the $40.00 price. [R. 1058-1070.] Respondents' cost of processing and selling a 12/46 oz. case of single strength orange juice with $40.00 fruit was $3.52 per case without the addition of anything for profit. [R. 1026-1044.] As previously pointed out, Sunkist, TreeSweet and Silzle in 1951 sold at a profit the 12/46 oz. size case at prices ranging from $2.50 to $2.80 per case in California and Arizona, and from $2.20 to $2.50 per case in all other cases [R. 815-819; Exs. 27, 28, 36; E 395-452, 461-466; R. 986-987, 2952-2954.] The manager of Exchange Orange readily admitted that no one could pay $40.00 a ton for fruit, and process and sell the resultant single strength juice at a profit. [R. 862-863.]

Over a period of several months respondent sought unsuccessfully to secure oranges from petitioners either at a price or under an arrangement which would permit it to compete price-wise with its competitors Sunkist, TreeSweet and Silzle. About the middle of June, 1951, Winckler inquired of Kelly, who was in charge of Sunkist's sales of product oranges to independent processors, whether there had been any change in the price of fruit. Kelly said the price was still $40.00 but that

he knew that juice was selling for $2.20 per case for the 12/46 oz. size. [R. 1058-1059.] Ten days later Winckler inquired of Kelly whether there was any possibility that the price of fruit would be adjusted so as to put it in line with the prices at which the juice was being sold. Kelly advised Winckler to discuss the matter with Wilcox, assistant general manager of Sunkist. [R. 1059-1060.]

The conference with Wilcox occurred around July 1, 1951. Winckler informed Wilcox that certain processors were offering juice at $2.20 per 12/46 oz. case and that there must be some special arrangement in effect between such processors and petitioners since it was impossible to pay $40.00 for fruit and sell the juice at such price. Wilcox advised Winckler to see Finley, general manager of Exchange Orange, who was the only person who could make such special arrangements. [R. 1060-1062.]

Around July 7, 1951, Winckler called Finley and asked for fruit under the same terms as petitioners were making oranges available to Winckler's competitors. Finley suggested that Winckler call again in about a week. [R. 1063.] Winckler called again around July 15, 1951, and was advised by Finley that nothing could be done. [R. 1064.][20]

On July 16, 1951, Winckler wrote Finley advising that he (Winckler) had surplus capacity and was pre-

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[20]On or about July 15, 1951, Finley, Wilcox and McCracken (President of TreeSweet) discussed a processing contract between TreeSweet and Exchange Orange [R. 912] which contract was executed on July 23, 1951. [Ex. 20, E 332-341.] Delivery of oranges to TreeSweet under this contract did not begin until July 31, 1951. [R. 912.] Finley admitted Winckler's request for fruit and said he told Winckler to see Kelly. [R. 857-858.]

pared to do custom packing on single strength juice in any can size, low temperature concentrate and hot pasteurized concentrate in any customary size, and requested a reply. [Ex. 45, E 479-480.] No reply was ever received. [R. 1065.]

Thereafter, Winckler called Finley periodically, seeking fruit at a price or on a basis comparable to that afforded other processors, but was refused. [R. 1065-1066.] At the time of these conversations with Finley, Winckler had no knowledge of the actual terms of the arrangements between Exchange Orange, and TreeSweet and Silzle, but he was aware of the fact that money would be lost on juice selling for $2.20 per case if made with $40.00 fruit. [R. 1066-1067.][31]

The record discloses a possible reason for petitioners' refusal to treat Winckler on a comparable basis with Winckler's competitors TreeSweet and Silzle. Kelly admitted that he had called Finley concerning complaints received from other processors to the effect that Winckler was a price-cutter. [R. 648.] The general manager of Sunkist's Products Department admitted that Winckler's prices on the sale of single strength juice were uniformly lower than the Sunkist selling prices on such juice. [R. 889.]

Winckler had purchased product oranges from petitioners for conversion into canned single strength orange juice during each year of its existence. Such purchases ranged from approximately $1,000,000.00 in 1946, to approximately $200,000.00 in 1948. In 1949, Winckler purchased 17.4 per cent of its total require-

[31]Respondent learned the actual terms of the TreeSweet and Silzle contracts upon discovery proceedings after suit was filed. [R. 3054-3055, 3101.]

ments from Sunkist, and 1.54 percent of its total requirements in 1950. [R. 661-662, 1005-1006, 1011, 1441-1442; Exs. BP, BQ, E 541, 542.]

The reason for the declining percentage in Winckler's purchases from Sunkist was the latter's requirement that Winckler pay cash for the fruit by cashier's check, whereas Sunkist's usual terms to the trade provided for payment within five days after delivery, or its customers were carried on an open account. [R. 658, 662-663, 1012-1016, 1432-1433, 1441-1446.] In their brief (p. 13, fn. 10) petitioners state that Winckler's purchases from them were put on a cash basis in 1948 because of Sunkist's dissatisfaction with Winckler's credit standing and the slowness of payment.[12] However, Kelly, the official in charge of Sunkist sales of product oranges to independents, admitted that petitioners had never lost a dime on any fruit sold to Winckler. [R. 649.]

Winckler sought to secure a supply of oranges from the Independent Growers and Shippers Association, the only source other than Sunkist which had oranges for sale in 1951. This Association had furnished a part

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[12] In 1946, Winckler had packed a large volume of orange juice products for inventory, particularly a new blend called "Citrus Cocktail," at a high fruit cost. Substantially all oranges so processed were purchased from Sunkist. A falling citrus products market in 1947 resulted in large inventory losses to Winckler, which inventory loss was common among independent processors in California that year. [R. 1196-1197, 1427, Ex. 39, E 467.] Winckler was able to remain in business after Chapter XI reorganization proceedings, which proceedings terminated in 1949. [R. 1085-1086, 1152-1155.]

of Winckler's supply in the three years prior to 1951. [R. 1011-1014.] No oranges were available from this source for purchase except at the $40.00 price. The Association selling agent, Morgan Ward, explained the reason as follows: He testified that petitioners controlled 70 percent of the available fruit and hence set the industry price on product oranges; that the Association, being competitive, had to offer its oranges at the same price in order to stay in business [R. 1582]; that few, if any, oranges could be sold at the $40.00 price because there were no customers to buy them—since petitioners in 1951 had all of the independent processors tied up in various types of processing contracts except Winckler, Case-Swayne and Paramount. [R. 1596.][33] Ward testified that the only way he could dispose of his oranges in 1951 was to enter into processing contracts with these three independ-

[33]As previously pointed out petitioners had contracts of various other types with Hyland-Stanford, Mission Dry, General Foods and Harts. [Exs. 15, 16, 17, 17A, 18, 19, E 297-331.] In a true processing contract [Exs. 18, 19, E 319, 325], the independent processor is paid a profit on the processing operation and the juice is sold by Sunkist under the Sunkist labels. Where Exchange Orange and not Sunkist, purports to sell the fruit under a fruit purchasing contract [Exs. 16, 17A, E 303, 314] the processor owns the fruit but does not have to pay for the fruit until it sells the juice processed therefrom. This type of contract continues in effect until cancelled and is part of a tie-in exclusive requirements deal wherein Exchange Orange gets first call on the processing facilities of the independent. [Exs. 15, 16, 17, 17A; R. 713-738; 790-795; 3050-3051.] The tie-in type of exclusive dealing contracts closed a potential market to competitors of Sunkist in the product orange market. [R. 1583-1587.]

ents, Paramount, Case-Swayne and Winckler; that he entered into contracts with these three concerns, which contracts accounted for better than 80 percent of the Association's fruit in 1951 [R. 1596-1597]; that he made a contract with Paramount for the production of concentrate which paid the Association quite a bit under the market price of $40.00 for the fruit [R. 1595]; that he made a processing contract with Case-Swayne for processing four or five thousand tons into single strength juice for which Case-Swayne was paid its processing costs plus a five percent profit, with the balance, after sale of the juice by Case-Swayne, being returned to the Association [R. 1592-1593]; that he made a processing contract with Winckler for processing approximately 5000 tons into frozen concentrate for which Winckler was paid its processing costs plus a profit of five per cent. [R. 1589-1590; Ex. 55, E 497-504.]

Ward explained that he made the contract with Case-Swayne for single strength juice and with Winckler for frozen concentrate because Winckler had frozen facilities and Case-Swayne did not; that he wished to be fair to both companies, and that had the Association awarded single strength contracts to both companies it would have had oranges "out in the market competing in canned juice form, competing against each other." [R. 1600-1601.]

Winckler's inability in 1951 to secure product oranges from petitioners either at a price or on any

basis which was comparable to the basis upon which petitioners made oranges available to Winckler's competitors, TreeSweet and Silzle, prevented Winckler from processing and selling any single strength orange juice, its principal product, in 1951. [R. 1005, 1052-1053.] As a result Winckler sustained a substantial operating loss in 1951. [Ex. 65, E 517.] This operating loss set in motion a chain of events which caused the loss of Winckler's plant and business. [R. 1089, 1915-1917.] It resulted in default on an installment and interest due under a Reconstruction Finance Corporation loan, which, because of an acceleration clause operative under such a situation, made the entire amount of the loan due. Although Winckler had had a line of bank credit, attempts to refinance the loan with the Reconstruction Finance Corporation and with commercial banks proved fruitless in view of Winckler's inability to secure oranges required to manufacture its principal product, namely, canned single strength orange juice. [R. 1089-1090; 1186-1190; 1259-1260.]

Summary of Argument.

The basic question in this case is whether the district court's instructions to the jury deprived three related agricultural cooperatives of whatever antitrust immunities are afforded them by Section 1 of the Capper-Volstead Act. The district court viewed the case as one which involved a combination and conspiracy between agricultural cooperatives and outsiders to impose unreasonable restraints upon competitors in the interstate market for California single strength orange juice. Petitioners claim that the district court's instructions, in which the Court of Appeals found no error, were so worded as to permit the jury to find combination and conspiracy not only among the cooperatives and outsiders, but also among only the three related cooperatives, and that since the jury's verdict was general it cannot be sustained unless both theories upon which the case was submitted are free from material error.

I.

The "Question Presented" herein by petitioners is not supported by the instructions of the trial court when such instructions are viewed in their entirety rather than piecemeal or in isolation. It is wholly contrived. It was "constructed" by fitting together five isolated bits of the trial court's charge, and by ignoring the charge as a whole which encompassed more than fifty pages of the printed record. It is only by insistence that the charge be viewed in such truncated fashion that petitioners were able to claim that the jury could have found combination only within the Sunkist cooperative system.

But when the trial court's instructions are read as a whole, rather than in isolated segments, it is clear that this case was submitted to the jury as one involving a combination and conspiracy among agricultural cooperatives and outsiders. On each phase of the case the instructions were consistently phrased in terms of a third-party conspiracy.

II.

Assuming that the trial court's instructions may be interpreted in such a way as to have permitted the jury to find liability if only the three related cooperatives conspired, there is nothing in Section 1 of the Capper-Volstead Act that makes such combination privileged if it imposes trade restraints upon competition of the kind and character which, if performed by private business corporations, would violate the Sherman Act. *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 326 U. S. 458, 467.

The evidence in this case showed that the three related cooperatives possessed monopoly power, and that they used that monopoly power to eliminate a competitor from a substantial market. They used monopoly power in one product to secure price and market control in another product. They fixed prices with competitors. They discriminated against competing buyers. Such conduct is violative of the Sherman Act whether done by private business concerns or by a group of related cooperatives.

The Court of Appeals quite properly invoked the doctrine of intra-enterprise conspiracy as one means of rejecting, in a case involving an otherwise established liability, the defense of petitioners based upon affiliation between corporate conspirators.

ARGUMENT.

I.

The Question Presented by Petitioners Is Not Supported by the Trial Court's Instructions to the Jury or by the Evidence.

The question presented by petitioners for review by this Court is wholly synthetic and completely artificial. It ignores most of the evidence[34] and ignores the instructions of the trial court to the jury when such instructions are viewed in their entirety. It was contrived by fitting together five isolated bits of the trial Court's charge to the jury, a charge which encompassed more than fifty pages of the printed record,[35] and by ignoring the remainder of the charge. Petitioners contend (Br. 17-20), contrary to established law,[36] that when these isolated segments of the trial

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[34]While the "Question Presented" is couched in terms of whether there is liability based upon the evidence at trial (Br. 2), petitioners nevertheless have confined their argument to alleged error in the instructions. The "Question Presented" seeks to know whether three related cooperatives have violated the antitrust laws upon proof only that they have agreed among themselves upon the division of the functions of processing and marketing the products of their grower members. Respondents' statement of facts clearly demonstrated that the evidence adduced at the trial showed the existence of an illegal conspiracy between petitioners and third parties. (See pp. 11-27, *supra*.)

[35]R. 3677-3725, 3729-3731, 3732-3735. These instructions were prepared after painstaking study by the trial court in conference with counsel, with full argument from both sides in the absence of the jury. The discussion and argument with respect to the instructions eventually given cover more than 420 pages of the printed record. [R. 2830-2943, 3159-3469.]

[36]A trial court's instructions to a jury must be viewed in their entirety, rather than piecemeal or in isolation. *Seaboard Airline Ry. Co. v. Padgett*, 236 U. S. 668, 672; *Spring Co. v. Edgar*, 99 U. S. 645, 659; *Railway Co. v. Whitton*, 80 U. S. 270, 291; *Western Mass. Ins. Co. v. Norwich & New York Transportation Co.*, 79 U. S. 201, 203; *Magniac v. Thompson*, 32 U. S. 348, 389.

Court's charge are analyzed separate and apart from the charge as a whole it becomes apparent that petitioners were deprived of the antitrust exemptions provided agricultural associations by Section 1 of the Capper-Volstead Act (7 U. S. C. Sec. 291), since under such isolated instructions, the jury could have found that there was a combination and conspiracy only between or among related agricultural associations to collectively process and market the products of their members, and that this is especially true in view of the fact that the jury's verdict was general. Stated in another way it is petitioners' position that because it cannot be assumed that the jury did not return its verdict upon the basis of an intra-enterprise conspiracy, it is therefore necessary to view the case as one which involves only an intra-enterprise conspiracy.[37]

Petitioners constructed the "Question Presented" in the following manner. After alluding to three general instructions petitioners say the jury was told that if petitioners (Sunkist and Exchange Orange) and the alleged co-conspirators (Exchange Lemon, TreeSweet and Silzle) conspired to restrain or monopolize interstate trade in citrus fruit juices, particularly single strength orange juice, and in pursuance of that conspiracy did any one of the six acts with resultant injury to Winckler, liability under the antitrust laws

[37]See Petition for Certiorari, No. 241, October Term, 1961, p. 12, fn. 6. This attempt to remove from the case the basic fact that the Amended Complaint charged, the evidence showed, and the instructions to the jury covered a conspiracy between agricultural cooperatives and third parties, is readily understandable in view of this Court's decision in *United States v. Borden*, 308 U. S. 188, 204-205, and in view of repeated acknowledgments by petitioners trial counsel that a combination between cooperatives and third parties is not immune from the proscriptions of the antitrust laws. [R. 2858-2859, 2861, 3242.]

was made out against petitioners. (Br. 17.)[38] Petitioners then cull from the remainder of the full jury charge four instructions, taken out of context, which, they contend, made the general charge just summarized specific in such a way as to permit the jury to find liability if only the constituent elements of the Sunkist cooperative system conspired. (Br. 17-18.) These isolated bits of the charge were: (a) that there was but one combination and conspiracy charged [R. 3697]; (b) that Sunkist and Exchange Orange could conspire together to violate Sections 1 and 2 of the Sherman Act [R. 3688-3689]; (c) that notwithstanding the charge that Sunkist and Exchange Orange conspired with TreeSweet, Silzle and Exchange Lemon, the jury could find that no one conspired or that some number less than the total conspired [R. 3730]; and (d) that there could be no verdict against Sunkist or Exchange Orange unless the jury found that they, or either of them, combined with either TreeSweet or Silzle, or Exchange Lemon and did one or more of the six acts in pursuance of such combination or conspiracy. [R. 3711-3712.][39]

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[38]This "paraphrase" is purportedly extracted from seven pages of instructions, that is, R. 3690, 3692-3694, 3711-3713.

[39]Even as to these "bit" instructions petitioners omitted any reference to important qualifications placed upon them by the trial court and that they were based upon instructions requested and approved by petitioners without the objections now made. For example, in the instruction designated (b) by petitioners (Br. 18) the following important qualification was omitted: "* * * subject to other instructions concerning the Capper-Volstead Act, and Section 6 of the Clayton Act, and the exemptions contained therein." [R. 3689.] This instruction was based on respondents No. 2 [R. 146] and *Kiefer-Stewart v. Seagram*, 340 U. S. 211. Again, in the instruction designated by petitioners as (c) (Br. 18), they omit any reference to their request that the Court make it clear that "* * * the conspiracy alleged is a conspiracy of the five, that is to say, with TreeSweet, Slizle,

While it is respondents' position that petitioners were not deprived of the antitrust exemptions afforded them by the Capper-Volstead Act even if petitioners' artificial narrowing of the charge be deemed to be controlling,[40] a review of the charge in its entirety will demonstrate that the case was submitted to the jury under instructions which made the finding of a third-party conspiracy implicit in any verdict returned against the petitioners.

The first fourteen pages of the instructions were standard.[41] The Court then instructed with respect to the contentions of the respective parties. It charged that it was plaintiffs' contention that "the defendants [Sunkist and Exchange Orange] and alleged co-conspirators [TreeSweet, Silzle and Exchange Lemon] combined, conspired and contracted to restrain interstate trade and commerce in California citrus juices

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ELP-" [R. 3727] and that they approved the instruction complained of. [R. 3730.] Again in petitioners (d) (Br. 18) petitioners fail to mention that the instructions therein referred to were based on their No. 7 [R. 184] as thereafter revised by them [R. 185] and ultimately given by the Court after extensive discussion in modified form [R. 3271-3290, 3292-3293, 3302-3307, 3711], and a companion instruction [17A, R. 196, 3351-3356, 3712.] Both instructions concluded with the language of the petitioners: "* * * your verdict must be for the defendants * * *." [R. 3711-3712.] Neither instruction was objected to by petitioners on the grounds now urged. [R. 3306-3307, 3355-3356.] Petitioners may not now assign error to such instructions. (See Rule 51, Federal Rules of Civil Procedure.)

[40] See Point II herein, *post*.

[41] These instructions [R. 3677-3690], dealt with the following subjects: the jury were the sole judges of the facts; the credibility of witnesses; the burden of proof; inconsistencies and discrepancies in testimony; preponderance of the evidence; admissions; the law of conspiracy; proximate cause and intervening cause. In addition the court instructed that the jury was "not to single out one instruction alone as stating the law but must consider the instructions as a whole." [R. 3679.]

and particularly single strength Valencia juice processed in California and sold in interstate commerce in 1951, in violation of Section 1 of the Sherman Act." [R. 3691-3692]; that "Plaintiffs further contend that the defendants and co-conspirators combined or conspired to monopolize the market for California citrus juices and particularly single-strength Valencia orange juice processed in California and sold in interstate commerce in 1951, in violation of Section 2 of the Sherman Act" [R. 3692.] These instructions are clearly couched in terms of a third-party conspiracy, that is, a conspiracy between one or both of petitioners and one or both of the independent processors, TreeSweet and Silzle.

In instructing with respect to acts innocent in themselves but which are performed pursuant to an unlawful conspiracy, the trial Court placed such acts in a setting of combination and conspiracy between one or both of petitioners and either TreeSweet or Silzle. The jury was told that if it found as a fact "that either or both of the defendants combined or conspired with TreeSweet or Silzle as charged in the first and second causes of action, and that any one or more of the acts alleged by the plaintiffs to have been committed pursuant to the combination or conspiracy were committed by either one of the defendants or co-conspirators, that you find were a party to such combination or conspiracy, that the act or acts so committed would then become the act of all members of the combination or conspiracy." [R. 3689.]

In instructing with respect to the geographical and distributive application of the Sherman Act the Court again described the alleged conspiracy in terms of a

combination between either one or both of the petitioners and TreeSweet or Silzle. The instruction reads [R. 3703]:

> "* * * If you find that either or both of the defendants combined with TreeSweet or Silzle to eliminate the competition of the plaintiff in the market for citrus fruit juices, particularly single-strength Valencia juice processed in California and sold in interstate commerce and that any of the acts charged to have been performed by such defendants were performed in furtherance of such combination or conspiracy, and that the performance of any of such acts was the proximate cause of any damage to the plaintiff, you should find that there was a violation of the antitrust laws and proximate causation, and you should proceed to the question of damage."

The trial court gave ample instructions with respect to the antitrust exemptions of agricultural cooperatives under both Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act. It instructed that the defendants Sunkist and Exchange Orange and the co-conspirator Exchange Lemon were cooperatives which were entitled to such exemptions from the antitrust laws as are afforded cooperatives by Section 6 of the Clayton Act and Section 1 of the Capper-Volstead Act; that Section 6 of the Clayton Act provides that nothing in the antitrust laws should be construed to forbid the existence and operation of agricultural organizations organized for the purpose of mutual help, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; that Section 1 of the Capper-Volstead Act

permits fruit growers to act together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, the products of persons so engaged; that such associations and their members may have marketing agencies *in* common, and may make the necessary contracts and agreements to effect such purposes, provided such associations are operated for the mutual benefit of the members thereof, as such producers. [R. 3699-3700.]

The Court instructed further that as a cooperative Sunkist is permitted to acquire a legal monopoly over product oranges available for processing into citrus fruit juices, including single strength orange juice; that Sunkist or Exchange Orange in 1951 could legally have processed all of such oranges in their own plants and could have refused to make any of such oranges available to independent processors; that defendant Exchange Orange, as the processing company for the grower members of Sunkist, could enter into lawful processing contracts with independent processors for processing oranges of Sunkist's grower members into citrus juices to be thereafter sold by Sunkist as the products of its grower members. [R. 3700-3701.] The Court, however, instructed that such contracts must be lawful contracts and not devices which were resorted to pursuant to the conspiracy charged to illegally restrain trade, or to illegally monopolize that part of the citrus juice market represented by citrus juices processed in California and thereafter sold in interstate commerce. [R. 3701.]

In dealing specifically with the contracts between Exchange Orange, and TreeSweet and Silzle, the Court

instructed in terms of conspiracy between petitioners and TreeSweet and Silzle. It charged that it was a question for the jury to decide whether the contracts between Exchange Orange, and TreeSweet and Silzle in 1951, when coupled with any refusal of Sunkist or Exchange Orange to make oranges available to plaintiff under comparable arrangements pursuant to the combination and conspiracy charged, were lawful processing contracts, or whether they were made pursuant to the combination and conspiracy charged and had the purpose or effect of restraining or monopolizing interstate trade in citrus juices, particularly single-strength orange juice processed in California and sold in interstate commerce, by eliminating competition between Sunkist and such processors in the interstate market for such products as were processed under such contracts. [R. 3701-3702.] By this instruction the jury was permitted to decide whether these contracts, made between the cooperative Exchange Orange and the independent processors, that is, the co-conspirators TreeSweet and Silzle were lawful or unlawful. The jury by its verdict found that such contracts were unlawful.

The instructions relating to monopoly were also couched in terms of a third-party conspiracy. The jury was told that two monopolies were charged; one, a monopoly over product oranges which plaintiff conceded would be a lawful monopoly in the absence of abuse; the other, a monopoly of the market for the juices made therefrom [R. 3692-3693]; that monopoly power consisted of the power to exclude a competitor from a market and the power to fix prices [R. 3704, 3706]; that if the jury found that the effect of the action of Exchange Orange in entering into

contracts with TreeSweet and Silzle in 1951, and in refusing to enter into a comparable arrangement with the plaintiff, was to exclude plaintiff as a competitor of Exchange Orange, TreeSweet and Silzle, from a substantial market for single strength orange juice processed in California and sold in interstate commerce, such exclusion would be unreasonable in and of itself, and illegal. [R. 3705.]

After instructing that it was illegal *per se* for two or more competitors to enter into any agreement which fixes or otherwise tampers with the price or price structure at which the products of such companies shall be sold in interstate commerce, the Court again instructed the jury in the language of a third-party conspiracy. The jury was told that if it found that the 1951 contracts between Exchange Orange and TreeSweet and Silzle had the necessary or intended effect of fixing or tampering with the price or price structure at which Sunkist, TreeSweet or Silzle sold single strength orange juice in interstate commerce, the jury might consider such fact in determining whether such contracts were in fact entered into as part of a conspiracy to restrain interstate commerce, or a conspiracy to monopolize or control the production and sale of California citrus fruit juices in interstate commerce, as charged by plaintiff. [R. 3705-3706.]

An additional charge was given on the abuse of monopoly power which was related directly to the contracts between Exchange Orange and TreeSweet and

Silzle and which involved the element of combination between an agricultural cooperative and a third party. After advising the jury that petitioners could not use their control over product oranges to extend their control over the citrus juices processed therefrom [R. 3706], the jury was instructed that if it found that Sunkist and Exchange Orange, or either of them, by combination or conspiracy, was seeking to extend their control in the juice market by making contracts with the independents, TreeSweet and Silzle, and that as a part of such combination and conspiracy they refused to make oranges available to plaintiff under comparable arrangements, and that such refusal eliminated plaintiff as a competitor of Sunkist, TreeSweet and Silzle in such market, they might find that the defendants violated the antitrust laws. [R. 3707.] This instruction is couched in terms of combination or conspiracy between agricultural associations and third parties.

The following general instruction was also couched in the language of a third-party conspiracy. It reads [R. 3711-3712]:

> "Unless you find, therefore from the preponderance of the evidence, that Sunkist or Exchange Orange or either of them, combined or conspired with either TreeSweet, or Silzle, or ELP, and in 1951 did one or more of the specific acts charged —those are the six acts, one or more of the six acts—charged in the first cause of action, and that such act or acts had the purpose or necessary effect of damaging or eliminating the competition of plaintiffs in the interstate market for Cali-

> formia canned citrus fruit juices or single-strength Valencia orange juice, your verdict must be for the defendant on the first cause of action."

A similar instruction was given with respect to the second count, that is, the Section 2 Sherman Act charge. [R. 3712.][42]

Before the jury had retired for deliberation counsel requested that additional clarifying instructions be given. [R. 3726-3729.] The jury was given further instructions, including the following instruction on the compositions of the parties to the alleged conspiracy in connection with the charge of monopolizing citrus fruit juices. [R. 3730]:

> "I also apparently erroneously talked about the charge was that the defendants had actually monopolized. The charge is that *the defendants and the co-conspirators* had monopolized, they succeeded in their conspiracy and had accomplished monopolization. *In other words, the co-conspirators are named in there. It does not involve solely the two defendants.*
>
> "I also am told that I spoke about how the defendants had conspired on one occasion. The charge is not that the defendants conspired. *The charge is that the defendants and co-conspirators conspired.*

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[42]Instructions were given on the following additional subjects: An instruction that only one combination and conspiracy was charged [R. 3697]; a charge that Sunkist and Exchange Orange could conspire to violate the Sherman Act, but that such was subject to the exemptions provided in the Capper-Volstead Act and Section 6 of the Clayton Act [R. 3688-3689]; an instruction relating to the circumstances under which a private business concern may select its own customers [R. 3709-3710]; instructions relating to certain exhibits, the Chapter XI proceedings in 1948, and damages. [R. 3113-3125.]

> However, as a matter of fact, you may find that nobody conspired, or you may pick out and decide that some number less than the total conspired. It is your task to decide the facts." (Emphasis supplied).

These additional instructions again describe the conspiracy as one between petitioners and third parties.

The jury retired and returned to inquire further about the six acts. After again explaining the relationship of these acts to the violation charged [R. 3732-3734], the Court instructed the jury that they "must treat all instructions as a whole and not single out any one of them, and any one you are considering you must consider in connection with all the other instructions." [R. 3735.]

The jury's understanding of the charge can be determined only by a consideration of the charge in its entirety;[43] not in isolated segments, as petitioners have proposed. Throughout the charge the trial court returned repeatedly to the composition of the parties to the alleged conspiracy, namely, one or both of the petitioners *and* one or both of the independent processors, TreeSweet and Silzle. Repeated emphasis was

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[43]Not only were the trial court's instructions to the jury repeatedly stated in terms of a combination and conspiracy between petitioners and the independent processors TreeSweet and Silzle, but such a theory of the case was argued by counsel for the plaintiffs, both in the opening statement [R. 499], and in his closing argument. [R. 3478, 3489, 3500, 3512, 3516-3538, 3556, 3560, 3672.]

placed upon the contracts between petitioner Exchange Orange, and TreeSweet and Silzle. The trial court left to the jury the determination as to whether these contracts were lawful or unlawful; whether they were parts of a plan to monopolize the citrus juice market, particularly single strength orange juice made by California processors and sold in interstate commerce; whether such contracts had either the purpose or effect of eliminating respondent as a competitor in the interstate market for California single strength orange juice. Such contracts were made between an agricultural cooperative and two non-cooperative companies. Had the jury found that such contracts were lawful it would not have returned a verdict against petitioners. To assert, as do petitioners, the likelihood that the jury could have based its verdict solely upon a conspiracy between petitioners and Exchange Lemon necessarily requires the assumption that the jury ignored the evidence and the issues, as well as the trial court's instructions.[44]

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[44]Certainly the trial court who was close to the case, had no such misgiving. In a discussion between court and counsel as to whether special interrogatories should be submitted to the jury on the composition of the parties to the conspiracy the trial court said [R. 3463]:

> "* * * If you get a verdict, you are generally able to sustain it, with the sole exception here if they [jury] only found Lemon [Exchange Lemon] was the other conspirator, and I don't know how they could find that. If there is a verdict for the plaintiff, you can rest assured TreeSweet and Silzle will be listed as the co-conspirators and not Lemon."

II.

Even Assuming That the Trial Court's Instructions Permitted the Jury to Find a Combination and Conspiracy Only Among the Related Cooperatives the Conduct Charged as Unlawful Was Not Privileged Under the Capper-Volstead Act and Violated Sections 1 and 2 of the Sherman Act.

While the Amended Complaint charged, the evidence proved, and the case was submitted to the jury under appropriate instructions as a five-party conspiracy among three related agricultural associations and two corporations for profit, the conduct charged as unlawful herein was not privileged under the Capper-Volstead Act even if the trial court's instructions be construed as permitting the jury to find a combination and conspiracy only among the three related cooperatives in the Sunkist system.

The petitioners take the flat position that absent a combination with outsiders the activities of an agricultural association are completely exempted from liability under the Sherman Act so long as such activities are concerned with the processing and marketing of the products of its grower members. They contend that each of the "six acts" alleged to have been done pursuant to the combination and conspiracy charged was concerned with some phase of processing and marketing of the products of their grower members; that they may make reciprocal processing contracts among themselves; they may set a price at which they will sell their products; they may make contracts with oth-

ers for the processing of their fruit, and they have the right to select the customers to whom they will sell the products of their growers. (Br. 21-30.)

It may be conceded that each of the "six acts", when viewed in isolation and without regard to the relationship of one to another, and without any consideration of the industry or business setting in which such acts were performed, is a type or kind of activity which is concerned with the processing and marketing of the agricultural products of the grower members of the three related associations which comprise the Sunkist cooperative system. In explaining such acts for the purpose of determining the issue of liability, petitioners consistently refuse to discuss them except as isolated activities in time, place and circumstance. Thus viewed, petitioners are able to ignore the competitive effects of such acts as a whole.

But such acts cannot be so viewed in determining liability in this case. They must be judged with respect to their effect upon competition when considered as a whole rather than in isolation,[46] and in the business or industry setting in which they occurred. When so viewed it becomes apparent that the "six acts", resulted in the imposition of unreasonable restraints in the interstate market for California single strength

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[46]In a case charging violations of the Sherman Act the charges in the complaint, as well as the evidence introduced to support such charges, must be considered in their entirety, rather than piecemeal or in isolation. *Swift and Company v. United States*, 196 U. S. 375, 396; *United States v. Patten*, 226 U. S. 525, 544. Acts innocent in themselves when standing alone or when viewed in isolation may be steps in a plan or program to destroy competition and hence may become actionable as part of the overall plan. *Associated Press v. United States*, 326 U. S. 1, 14; *American Tobacco Co. v. United States, supra*, at p. 809.

orange juice in 1951. In sum the situation was as follows:[46]

In 1951, petitioners controlled the supply of by-product oranges in the California-Arizona area which were available to independent processors for the manufacture of California single strength orange juice. After consultation with independent processors, including the co-conspirators TreeSweet and Silzle, but not Winckler, petitioners set a price of $40.00 per ton on their product oranges and maintained such price throughout the year. They were unable to sell any oranges at such price for conversion into single strength orange juice. There were four independent processors of single strength orange juice in the California-Arizona area in 1951 who were dependent upon others for their supply of oranges. These four concerns were the co-conspirators TreeSweet and Silzle, Case-Swayne, and Winckler. These four concerns competed directly with each other, and all four competed with Sunkist in the sale of California single strength orange juice in the interstate market for such juice. Of the four independents only Winckler had been a regular customer of Sunkist in the purchase of product oranges.

Petitioners then entered into contracts with TreeSweet and Silzle under the terms of which oranges were made available to the latter at prices which in fact and in effect were far below their $40.00 published selling price, and pursuant to which TreeSweet and Silzle sold the resultant single strength orange juice processed there from in the interstate market at non competitive and fixed prices which guaranteed them a

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[46]See Respondent's theory of liability and the evidence in support thereof, pages 11-27.

profit. Petitioners offered a similar contract to Case-Swayne which that company refused since it had already otherwise committed its processing facilities. Although respondent made repeated timely requests for oranges, either at a price or under an arrangement which would permit it to process and sell single strength juice at prices which would be competitive with the prices at which its competitors Sunkist, TreeSweet and Silzle were selling such juice, petitioners refused to make oranges available to respondent except at the $40.00 price, while at the same time conceding that no one could pay $40.00 per ton for oranges and process and sell the single strength juice at prices competitive to those charged by Sunkist, TreeSweet and Silzle. In addition, maintenance of the $40.00 price throughout the year by Sunkist, the industry leader, together with the fact that petitioners had tied up with contracts all of the available independent processors of hot and frozen concentrate, prevented respondent from securing oranges from the only possible alternative source of supply, the Independent Growers and Shippers Association, except at the $40.00 price. The result was that respondent was unable to process and sell any single strength orange juice, its principal product in 1951, and hence lost its 1951 anticipated profit, its plant and business.

Thus, the six acts, when viewed together and in the industry setting in which they occurred, became more than mere normal activities of processing and marketing the products of the grower members of the Sunkist

cooperative system. They became instruments which were used to eliminate a competitor from a substantial market.[47] They constituted an abuse by petitioners of their monopoly control over product oranges. Petitioners used their monopoly control over product oranges to secure a monopoly in the interstate market for California single strength orange juice. Petitioners fixed the price of their product oranges after consultation with their competitors, including TreeSweet and Silzle. Petitioners fixed the prices of California single strength orange juice in agreement with the co-conspirators TreeSweet and Silzle.[48] As the seller of product oranges available to independent processors for processing into single strength orange juice, petitioners discriminated in favor of two and against one of the competing buyers.

If these acts, in the industry setting in which they occurred, had been performed by private business corporations they would constitute violations of Sections

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[47]The total amount of California single strength orange juice processed from all sources in the California-Arizona area in 1951, was 5,400,000 gallons. [Ex. 10, E 285.] Of this total 4,409,266 gallons, or approximately 82 percent, was processed by petitioners, TreeSweet and Silzle. TreeSweet processed 2,382,744 gallons and Silzle processed 661,650 gallons. [Exs. 9, 10, 11; E 282-283, 284-285, 285-291.] Respondent produced and sold no single strength orange juice in 1951. [R. 1020, 1052.]

[48]Respondents did not claim that the price-fixing between petitioner and TreeSweet and Silzle on the single strength juice was a cause of damage, but did claim that it was one of the elements relating to liability for violation of the antitrust laws. [R. 2926-2929.] Neither did respondents claim that the Exchange Orange-Exchange Lemon processing deals were the cause of any damage to respondents. [R. 2005, 2850.]

1 and 2 of the Sherman Act. Setting aside for the moment any consideration of antitrust exemptions afforded agricultural cooperatives by the Capper-Volstead Act, the conduct charged herein as unlawful will be examined in the light of the applicable case law:

The real indicia of monopoly power is power "to exclude competition when it is desired to do so"; and power to control or fix prices. *American Tobacco Co. v. United States,* 382 U. S. 781, 809, 811, 814. Petitioners possessed monopoly power. They controlled the supply[49] as well as the price of by-product oranges in the California-Arizona area. They also controlled the prices at which California single strength orange juice was sold in the interstate market. They had power to exclude competition, and they exercised such power by eliminating respondent as a competitor in the interstate citrus juice market, particularly the interstate market for California single strength orange juice. It is "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co. v. United States*, 332 U. S. 392, 396. And "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith*, 334 U. S. 100, 107.

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[49]Respondents made no attack on petitioners' monopoly control over California-Arizona by-product oranges, as such. It was assumed that Capper-Volstead permits an agricultural association to secure control over the supply of fruit provided such control results from the voluntary act of local growers in becoming members of the Association. The trial court instructed the jury that petitioners could acquire a legal monopoly of by-product oranges, even 100 percent control of such market. [R. 3700.] The Court instructed, however, that such a monopoly could not be abused in such a way as to restrain competition. [R. 3700.]

Abuse of monopoly power was demonstrated in the action by petitioners setting and maintaining the $40.00 price for product oranges, and in refusing to sell oranges to Winckler except at that price while at the same time admitting that no single strength juice processor could pay such price and process and sell the resultant juice at prices which would be competitive with the prices at which petitioners, and their favored customers Tree-Sweet and Silzle, sold such juice. The resultant price squeeze was strikingly similar to that which was imposed by Alcoa upon its aluminum sheet customers at a time when that company had a monopoly on the production of ingots essential to the manufacture of sheet. This price squeeze was condemned as an abuse of monopoly power in *United States v. Aluminum Company of America,* 148 F. 2d 416, 437, 438 (C. A. 2, 1945).

Petitioners' refusal to sell oranges to respondent except at the $40.00 price, while at the same time making oranges available to respondent's competitors, Tree-Sweet and Silzle in fact and effect at little more than half that price, was unlawful under the Sherman Act since it conferred a monopoly on petitioners, TreeSweet and Silzle in the interstate market for California single strength orange juice. *Lorain Journal v. United States,* 342 U. S. 143, 155. And where such refusal is a part of a combination and conspiracy to eliminate a competitor it is unconditionally unlawful. *Eastern States Retail Lbr. Dealers Assn. v. United States,* 234 U. S. 600, 614.

The wide difference in the price at which Winckler was offered oranges as compared to the price or arrangement under which oranges were made available to its competitors TreeSweet and Silzle, was a discrimination

imposed by the seller upon competing buyers, and as such violated the Sherman Act. *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 159-161; *Interstate Circuit, Inc. v. United States*, 306 U. S. 208, 231.

Consultation between petitioners and competing independent processors with respect to the price at which petitioners should offer by-product oranges for sale, as well as similar consultation between petitioners and Tree-Sweet and Silzle with respect to the selling prices of California single strength orange juice to be sold in the interstate market, was a *per se* violation of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221; *United States v. Trenton Potteries*, 273 U. S. 392, 397-398.

In view of this case law, unless the Capper-Volstead Act made such conduct privileged, petitioners violated both Sections 1 and 2 of the Sherman Act. This Court has had occasion to treat directly with the scope of the exemption from antitrust proscriptions provided by the Capper-Volstead Act, in *United States v. Borden*, 308 U. S. 188, and in *Maryland and Virginia Milk Producers Assn., Inc. v. United States*, 362 U. S. 458. In *Borden* an indictment charged that a milk association organized as an agricultural cooperative, major distributors of milk and allied groups, labor union officials, municipal officials and others, had conspired to fix non-competitive prices to be paid to all producers by all distributors for all fluid milk produced in four mid-western states and shipped into Chicago; to fix non-competitive prices for the sale by distributors in Chicago of fluid milk shipped in from the states in question and to limit and control the supply of fluid milk coming into Chicago from such states. (308 U. S. at 191, 194.)

In applying Section 1 of the Capper-Volstead Act to the facts alleged in the indictment this Court held that the right given by such Act to agricultural producers to unite in marketing their products and to make contracts essential thereto "cannot be deemed to authorize any combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise". (308 U. S. at 204-205.) It held that such a combined attempt to control the market had no justification in Section 1 of the Capper-Volstead Act (*id.* 205), and that Section 1 of such Act "cannot be regarded as authorizing the sort of conspiracies between producers and others that are charged in this indictment." (*id.* 206.) This Court concluded that the conduct charged did not come within the scope of the activities made privileged by Capper-Volstead.

The basic issue in *Borden* was not the loss of a privilege given by Capper-Volstead merely because there was an argument between the cooperative association and outsiders, but rather that the conduct charged was neither consistent with nor essential to the purposes of the cooperative, and was of such a kind or character that if done by an ordinary business corporation would clearly be violative of the Sherman Act. The Court held that Capper-Volstead did not authorize the kind of activities and agreement with outsiders which was charged in the indictment.

Recently, this Court again examined the nature and extent of the Capper-Volstead exemptions. In *Maryland and Virginia Milk Products Assn. v. United States*, 362 U. S. 458, the United States brought an action against a milk producers association which supplied approximately 86 percent of the milk purchased by all

milk dealers in the Washington, D. C. metropolitan area. The association membership consisted of some 2,000 dairy farmers located in Maryland and Virginia. The Association was charged with an attempt to monopolize and with actual monopolization of commerce in fluid milk in Maryland, Virginia and the District of Columbia in violation of Section 2 of the Sherman Act; with eliminating and foreclosing competition in the same area by the making of contracts and agreements with Embassy Dairy and others in violation of Section 3 of the Sherman Act, and with lessening competition and tending to create a monopoly through the purchase of all the assets of Embassy Dairy, the largest milk dealer in the area which competed with the Association, in violation of Section 7 of the Clayton Act. (362 U. S. at 460-461.) The Association claimed complete immunity from the antitrust laws by virtue of Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act. (*id.* at p. 461.)

The District Court held that an agricultural cooperative is completely exempt from the antitrust laws, both with respect to its existence as well as to all of its activities, so long as it does not combine or conspire with non-producers of agricultural products. (*Id.* at p. 461.) It, therefore, dismissed the Section 2 Sherman Act monopolization charge under which the Association was not alleged to have acted in combination with others, but upheld the Government's right to go to trial on the Section 3 Sherman Act and Section 7 Clayton Act charges since they involved activities with others who were not agricultural producers. (*Id.* 462.)

This Court affirmed the judgment of the District Court which found violations of Section 3 of the

Sherman Act and Section 7 of the Clayton Act,[50] and reversed the action below in which the charges under Section 2 of the Sherman Act had been dismissed. In so doing this Court interpreted the language of Section 1 of the Capper-Volstead Act as well as its legislative history. As to the former the Court said that it was reasonably clear that the general philosophy of such Act "was simply that individual farmers should be given, through agricultural cooperatives acting as entitled the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities"; that the legislative purpose[51] of the Act was "to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws"; that the legislative history "does not suggest a congressional desire to vest cooperatives with unrestricted power to restrain trade or to achieve monopoly by preying on independent producers, processors or dealers intent on carrying on their own businesses in their own legitimate way." (362 U. S. at 466-467).

The Court then referred to the statements of the Secretary of Agriculture and the Solicitor of the De-

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[50]A trial had been had upon these two charges and a decree entered against the Association (167 Fed. Supp. 799; 168 Fed. Supp. 880).

[51]The Court was referring to the following quoted passage from the *House Report* on the Act (H. R. Rep. No. 24, 67th Cong., 1st Sess. 2):

> "Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so the farmers can take advantage of it. * * *"

partment of Agriculture, made at the Senate Committee hearings on the bill, to the effect that "the Act would not authorize cooperatives to engage in predatory practices in violation of the Sherman Act." *(Id.* 467.) Finally, the Court set out the following passage from the House Committee Report which reads:

> "In the event that Associations authorized by this bill shall do anything forbidden by the Sherman Antitrust Act, they will be subject to the penalties imposed by that law."[82]

and concluded that such passage "correctly interpreted the Capper-Volstead Act, and that the Act did not leave cooperatives free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative." *(Id.* 467.)

The essential holding in *Milk Producers Assn.* was that the Capper-Volstead Act was intended to place an association of farmers in a position of competitive equality with private business corporations, but that such associations were to remain subject to the proscriptions of the antitrust laws in the same way as private business corporations. Since the activities of petitioners herein were of the kind and character which clearly would have been violations of the Sherman Act had they been performed by private business corporations, and since the activities of agricultural associations are subject to the proscriptions of the antitrust laws in the same way and to the same extent as are private business corporations, the petitioners herein violated Sections 1 and 2 of the Sherman Act even if the trial

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[82] *H. R. Rep.* No. 24, 67th Cong., 1st Sess. 3.

court's instructions be interpreted in such a way as to have permitted the jury to find a combination and conspiracy only among the three related cooperatives of the Sunkist cooperative system.

Petititoners contend (Br. 30-32) that the Court of Appeals erred in viewing the case as one which was controlled by the doctrine of intra-enterprise conspiracy because, they say, such combination was made privileged by Capper-Volstead. They claim that such doctrine has been used "only to reject, in a case involving an otherwise established liability, a defense based on affiliation between the corporate conspirators" (Br. 31.) But petitioners' contention is based upon the erroneous assumption that the so-called "six acts" relating to liability are privileged. As we have demonstrated such acts, when viewed against the industry setting in which they occurred, were not privileged, but on the contrary constituted violations of Sections 1 and 2 of the Sherman Act. Hence, the Court of Appeals quite properly invoked the doctrine of intra-enterprise conspiracy to reject a defense based upon affiliation between the corporate conspirators "in a case involving an otherwise established liability," and in so doing acted in accordance with petitioners' concept of what this Court was held should be done in such circumstances.

The contention (Br. 34) that none of the "six acts" would have been violative of the antitrust laws had they been performed by a one-entity cooperative and that they cannot therefore, become violative of the antitrust laws merely because they were performed by two related cooperatives, simply ignores reality. These acts, in the business setting in which they were performed, had the direct effect of eliminating a competitor from a

substantial interstate market. Violations of the anti-trust laws are determined by the nature, the character, and the substantive effects of the acts and practices which are attacked, rather than by the mere form in which the assailed transactions are clothed. *United States v. American Tobacco Co.*, 221 U. S. 106, 180-181; *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 221. Nor does the form of business organization control, since the basic test is the presence of trade restraints or monopoly. *Appalachian Coals, Inc. v. United States*, 288 U. S. 344, 377.

It is submitted that whether the trial court's instructions to the jury with respect to the composition of the parties to the conspiracy herein charged be interpreted as one involving a conspiracy between cooperatives and outsiders, or whether such instructions be interpreted as a conspiracy only among the related cooperatives in the Sunkist system, the judgment of the jury must be sustained. Under either theory petitioners were liable for violations of Sections 1 and 2 of the Sherman Act.

Conclusion.

The judgment of the Court of Appeals, insofar as it affirmed the judgment of the district court on the issue of liability, should be sustained.

Respectfully submitted,

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APPENDIX

Statutes Involved

SHERMAN ACT (15 U. S. C. A., Secs. 1, 2)

§1. Every contract, combination, in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . [July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693.]

§2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. . . . [July 2, 1890, c. 647, §2, 26 Stat. 209].

CLAYTON ACT (15 U. S. C. A., Secs. 4, 6)

§4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. [Oct. 15, 1914, c. 323, §4, 38 Stat. 731].

§6. The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws. [Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.]

CAPPER-VOLSTEAD ACT [7 U. S. C. A. Sec. 291.]

§1. Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: *Provided, however,* That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First: That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second: That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third: That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members. [Feb. 18, 1922, c. 57, §1, 42 Stat. 388.]